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Albis Plastics and United Steelworkers of America, District #12, AFL-CIO, CLC. Cases 16-CA-19615, 16-CA-19615-2, 16-CA-19615-3, 16-CA-19615-5, 16-CA-19615-6, 16-CA-19758, and 16-CA-19758-2

August 27, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN
AND TRUESDALE

On May 20, 1999, Administrative Law Judge Keltner W. Locke issued the attached bench decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief, and has decided to affirm the judge's rulings, findings,¹ and conclusions, except as modified below, and to adopt the recommended Order as modified and set forth in full below.

1. The Respondent has excepted to the judge's finding that it violated Section 8(a)(1) of the Act by instructing employees to remove union stickers from their safety helmets, or "bump caps." The Respondent argues that its concern for plant safety, discussed below, constitutes "special circumstances" that justify the ban. We have carefully weighed the Respondent's safety concerns against the employees' right to display union insignia, and we find that, under the working conditions at issue here, the Respondent has established "a legitimate . . . and not unwarranted" concern for safety² that justifies its prohibition of union insignia on the caps, and we dismiss this allegation.

The relevant facts are as follows. The Respondent manufactures plastic products in a large, two-level, industrial and warehouse facility, which, according to the parties' stipulation, is such that "serious work injuries or illnesses can occur that require immediate first aid or CPR." The Respondent began providing "bump caps" to employees in 1994. From that time it has required three

categories of plant personnel to wear identifying stickers on their bump caps: past or current members of the safety committee; employees with training in first aid or cardiopulmonary resuscitation (CPR), and employees certified to operate a forklift; all other stickers, marks, or decals are prohibited. The Respondent stipulated at the hearing, and the credited testimony demonstrates, that employees observed with union stickers on their bump caps were asked to remove the stickers. The credited testimony also demonstrates that employees observed with unauthorized stickers unrelated to the Union on their bump caps were also instructed to remove the stickers. The Respondent does not extend the ban on union insignia beyond the bump caps, and employees are free to display union marks on clothing, toolboxes, and other equipment.

At the hearing, Mark McGrew, the Respondent's safety manager, testified that the Respondent placed a high priority on the ability of plant personnel to identify, rapidly and from a distance, employees whose safety skills or first aid training enabled them to handle plant emergencies. McGrew testified that members of the safety committee have augmented training and knowledge of machinery and other hazards, and that the Respondent instructs employees to seek out a safety committee member in emergencies or to assist with safety issues. Similarly, the first aid sticker enables plant personnel to act quickly in emergencies by enabling them to locate trained personnel. Thus, the authorized stickers convey information about the wearer that is relevant to plant safety.

McGrew testified further that federal regulations prohibit individuals without current certification to operate forklifts, and that the Respondent relies on supervisors to ensure that the rule is followed. Forklift certification is reviewed each year and a new bump cap sticker of a different color is issued to employees who have retained eligibility. McGrew testified that supervisors scan the plant floor to ascertain that only qualified employees operate forklifts. McGrew testified that in his experience, extraneous stickers make it more difficult to spot the authorized stickers quickly and from a distance.

Based on the above evidence, the Respondent argues that its authorized stickers communicate information about the bump cap's wearer, information that would be less accessible, especially from a distance, if the caps bore other stickers. It asserts that it prohibits *all* unauthorized stickers on bump caps because they interfere with its use of its authorized stickers to ensure that, when necessary, the nearest employee with the relevant special training is easily visible and that supervisors and other

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² *Standard Oil of California*, 168 NLRB 153 fn. 1 (1967).

employees can ascertain that employees using forklifts are certified.

The judge rejected these arguments, finding that the Respondent failed to show that safety concerns necessitated the ban or that a blanket ban was necessary to assure the visibility of the authorized stickers. The judge found that the Respondent failed to show that it could not achieve its goal of ensuring that the caps and authorized stickers were visible by limiting the size or location of union stickers. Thus, he found that the Respondent had violated Section 8(a)(1) by requiring employees to remove union stickers. As noted above, we find merit in the Respondent's arguments.

It is well established that an employee's right to wear union insignia while at work is protected by the Act. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 795–804 (1945). The Board has held that, in the absence of “special circumstances,” an employer's prohibition of or limitation on the display of union insignia violates Section 8(a)(1). *Ohio Masonic Home*, 205 NLRB 357, 357 (1973), enf. mem. 511 F.2d 527 (6th Cir. 1975). Thus, “a rule which curtails that employee right is presumptively invalid unless special circumstances exist which make the rule necessary to maintain production or discipline, or to ensure safety.” *Kendall Co.*, 267 NLRB 963, 965 (1983) (emphasis added and footnote omitted). In cases where the employer argues that special circumstances justify a ban on union insignia, the Board and courts balance the employee's right to engage in union activities against the employer's right to maintain discipline or to achieve other legitimate business objectives, under the existing circumstances. *Standard Oil*, supra, 168 NLRB 153, 161, citing *Fabri-Tek, Inc.*, 148 NLRB 1623 (1964), enf. denied 352 F.2d 577 (8th Cir. 1965). “Special circumstances” include, inter alia, situations in which display of union insignia could jeopardize safety. *Standard Oil*, supra.

When an employer asserts that it has curtailed the right to wear union insignia on hardhats based on safety concerns, the Board examines the conditions in the workplace to determine if there is a showing that the circumstances necessitate the curtailment. In *Malta Construction Co.*, 276 NLRB 1494 (1985), enf. 806 F.2d 1009 (11th Cir. 1986), the Board found that the respondent had failed to make such a showing. The hardhats were worn at an open-air construction site, where employees worked in daylight hours. The respondent argued, inter alia, that the ban promoted the hardhats' visibility. Id. at 1495. The Board rejected this argument, finding that in the bright outdoor workplace, the union stickers did not interfere with visibility, and observing that the respondent had no trouble identifying foremen, who wore less con-

spicuous hardhats. The Board also distinguished between the bright, open-air workplace there and industrial settings where employees worked with machinery. Id. at 1494–1495, fn. 4.

In *Eastern Omni Constructors*, 324 NLRB 652 (1997), enf. denied in relevant part 170 F.3d 418 (4th Cir. 1999), the Board found that the respondent, a construction company, had failed to show that safety concerns justified a ban. Although the judge referred to testimony that employer stickers on the helmets denoted, inter alia, safety training and forklift certification, he also found that the Respondent had in the past permitted other types of stickers. The judge found “no evidence of any special circumstances relating to safety,” id. at 655, and the Board adopted the finding.³

By contrast, when an employer demonstrates, based on the conditions of the workplace, that curtailing the employees' right to display union insignia is necessary to its safety objectives, the Board will dismiss allegations that the ban is unlawful. In this regard, employers with industrial or manufacturing operations have successfully argued that workplace conditions can heighten the need to ensure that employees are readily visible in the workplace, that it uses hardhats to increase the wearer's visibility or transmit information, and that extraneous markings or stickers can interfere with visibility and thus with safety. In *Standard Oil*, supra, 168 NLRB 153, the employer operated an oil and chemical refinery where “highly volatile, dangerous, and hazardous gases necessitat[ed] an elaborate safety precaution system.”⁴ The employees wore hardhats designed to identify them, among the employees of a number of other employers in the refinery, as Standard Oil employees, and to indicate which employees were capable of performing safety tasks. Id. at 159. The employer argued that under these conditions, safety concerns justified its prohibition of all stickers on hardhats, and the Board agreed, finding that the employer “established that it had a legitimate, long-standing, and not unwarranted concern about the threat to safety posed by the use of unauthorized decorations on work hats.” Id. at 153, fn. 1.

Similarly, in *Andrews Wire*, 189 NLRB 108 (1971), aff. 79 LRRM 2164 (4th Cir. 1971), employees in a steel mill wore bright, highly visible hardhats expressly

³ Based on a more detailed analysis of the respondent's safety arguments, the court of appeals reversed the Board, finding that the respondent's concern that unauthorized stickers could, by interfering with the visibility of authorized stickers, delay reaction to “dangerous situations in its industrial facility,” justified the ban. As the court stated, “[t]hese concerns for safety were valid and amply supported [the respondent's] decision to ban non-company authorized decals on hardhats.” Id. at 425.

⁴ *Malta Construction Co.*, supra, 276 NLRB 1494, 1494–1495 fn. 4.

designed to compensate for the mill's poor lighting. The employer "feared that if employees were permitted to attach to the hat insignia of less bright colors, as some employees did, visibility of the hat and consequently the safety of employees would be impaired." *Id.* at 109. On this basis, the Board found that the employer had, as in *Standard Oil*, demonstrated legitimate safety concerns, and dismissed the allegation.

We find decisive similarities between this case and *Standard Oil* and *Andrews Wire*. In those cases, as here, the workplaces were enclosed industrial facilities with characteristics, such as smoke, dim lighting or, in this case, a two-level layout, requiring measures to ensure that visibility was not unnecessarily impeded. In each case, the employer showed that employees wore hardhats in part to counteract the limitations on visibility in the plant. Further, in each case, the employer showed that, given prevailing conditions, allowing unauthorized decals would impair safety by reducing the visibility of the hardhat itself or by interfering with the ability of plant personnel to "read" the information conveyed by the authorized stickers. We find, then, as in *Andrews Wire* and *Standard Oil*, that the Respondent has shown that its safety concerns are warranted, that its ban on union insignia is a legitimate part of its strategy to promote plant safety, and that unauthorized stickers could interfere with the ready visibility of the bump caps and authorized stickers. Thus, we find that "special circumstances" justify the Respondent's ban on union stickers on employees' bump caps, and we dismiss this allegation.⁵

2. The judge also found that the Respondent violated Section 8(a)(3) and (1) by issuing a disciplinary warning and suspension to Hall in February 1999. For the reasons that follow, however, we disagree.

The relevant facts, as found by the judge or uncontested in the record, are as follows. The Union commenced an organizing campaign at the Respondent's Rosenberg, Texas facility in October 1998.⁶ William Hall was a material handler and an active and open union supporter. The Respondent violated Section 8(a)(1) in November by threatening Hall for "harassing" other em-

ployees in connection with his union solicitation and by taking this alleged "harassment" into account in conducting his job performance evaluation in December. On February 6, 1999,⁷ Hall, at a time when he was not scheduled to work, distributed union literature outside the plant. While Hall was leafleting, the Respondent attempted unsuccessfully to call him in to substitute for a fellow employee.⁸ Then, Hall received a warning on February 12 and a 24-hour suspension on February 22, which the judge found was imposed in retaliation for the February 6 leafleting. We find, in disagreement with the judge, that the Respondent has demonstrated that it would have disciplined Hall even in the absence of the protected activity.

It is undisputed that Hall was not an exemplary employee. In this regard, the record shows that the Respondent had criticized Hall's performance in his 6-month performance appraisals in June and December. In June, although his overall rating was "competent and successful," Hall received a rating of "needs improvement" in the following "key areas": dependability, initiative, productivity, teamwork, and work environment/safety. His performance was summarized as follows:

William is a knowledgeable material handler. He has experience in both the warehouse and Production. He has the technical (computer) and problem solving skills necessary to do a good job. William must understand he is part of a team and raw material supply is not the entire job. He must keep the warehouse clean and straight, outside areas must be kept clean, he must use his idle time effectively. He should be filling in for fellow workers as they are for him. Safety is an absolute requirement of his job and smoking on the forklift is not keeping an eye on safety.

Improvement in the areas above will be required for William to keep his competent/successful rating.

Hall's December appraisal reflected similar problems. Apart from his rating in "interpersonal skills," which reflects the Respondent's unlawful consideration of Hall's union activity, Hall received a rating of "needs improvement" in the following key areas: initiative, job knowledge, productivity, and teamwork. A summary of his performance echoed the June appraisal:

William is a knowledgeable Material handler. He has experience in both the Warehouse and Production. He

⁵ We disagree with the judge that the Respondent should have tried to achieve its safety goals through a more limited ban and that it failed to show that unauthorized stickers actually interfered with the visibility of its stickers. It is within the Respondent's purview to set policies to prevent industrial accidents or safety problems. As the court held in *Eastern Omni*, "[t]he potential for serious injury . . . as with most industrial facilities, is self-evident. [The respondent] was not required to wait until an employee was electrocuted before instituting a ban on noncompany authorized decals on hardhats." 170 F.3d at 425 (citations omitted).

⁶ Unless otherwise noted, all subsequent dates in the latter half of the year are in 1998.

⁷ Unless otherwise noted, all subsequent dates in the first half of the year are in 1999.

⁸ Although the record indicates that the Respondent was critical of Hall for showing reluctance when asked to fill in for other employees, he was not disciplined for failing to come in to work.

has the technical (computer) and problem solving skills necessary to do a good job. William must understand he is part of a team and raw material supply is not the entire job. He must keep the warehouse clean and straight, outside areas must be kept clean, he must use his idle time effectively. He must complete his work from his shift prior to leaving (paperwork, issues, cleanup, etc.). He should be willing to fill in for fellow workers as they are for him. Safety is an absolute.

William has not been working on continuous improvement in the areas above as required from his previous review. Because he has not made a consistent effort his rating is changing to Improvement Needed.

[Emphasis added.]

Because of his failure to address the problems with his performance, the Respondent withheld the merit portion of Hall's January wage increase. In addition to the issues set out in his performance appraisals, Hall admitted at the hearing that he had made a significant and costly production error in late 1998, for which he received a warning and which, the judge found, the Respondent lawfully considered in determining the amount of his January wage increase.⁹ Hall also admitted at the hearing that beginning in late 1998, he made a practice of checking each night's production records and publicizing to other employees and to management any errors made by other employees. This monitoring of other employees' work was in no way related to his job duties, and the only justification he gave for the practice was that he wanted other employees to learn from their mistakes.

On February 12, the Respondent issued a written warning and 90-day Action Plan to Hall, which stated, in relevant part:

Your review was given to you on December 21, 1998 raising specific issues causing the "needs improvement" evaluation. Since the evaluation you have decided not to correct the initiative, teamwork & productivity issues but are spending time reviewing [the] computer entries of your team members. The purpose of the review you are making is for pointing the finger at your team members. This is not part of your job description or what Albis wants you to do. This is causing hard feelings and disrupting the team dynamics. Additionally . . . you are spending time in the upper levels in the Production Department and [are] not performing your other material handling duties. There is

no reason for you to be in the upper levels of the Production Department to perform your material handling duties.

The initiative, teamwork and productivity issues must be addressed within the next 90-day period. Additionally, the time being used for unproductive/counter-productive items must end immediately. You have previously been issued 2 warnings (review material error). If these issues continue and/or are not addressed in/during this 90 day time period, Albis will have no alternative but to terminate your employment.

On February 13, Hall was issued two further warnings for conduct occurring on February 12. The first warning stated, in relevant part:

William left a discussion with his Manager and immediately [sic] he was in a discussion with [employee] Lee Conklin outside the lab with a load suspended in the air.¹⁰ This was unsafe.

The second warning stated, in relevant part:

William Hall received a warning from his department on 2-12-99. When the oncoming shift came in [employee] Paul Lyle picked that warning up from the lab's lunch cabinet . . . Then William entered break-room at 7:40 and started discussing his work performance issues with Paul instead of being out on the floor at shift change. This is a time when he should be busy tying up the end of shift. Hector Carrejo witnessed this conversation. Joe Schochler witnessed paper being retrieved by Paul from cabinet.

Although Hall noted on the written warning that he disagreed with it, he did not deny the conduct alleged as the basis for the discipline. He wrote, "I believe that everything I do is never the right thing. The only thing I can do is keep doing what I can do to correct these items."

On February 22, the Respondent suspended Hall. The notice of suspension was signed by Robert LaVigne, the Respondent's logistics manager, and George Jackson, Hall's supervisor, and stated, in relevant part, that:

William was given a 90-day Action Plan on February 12, 1999. This Action Plan was a result of his last 2 reviews. The last review being graded as "needs improvement" due to work performance issues, which need to be corrected . . .

⁹ The General Counsel had alleged that the denial of the merit raise portion of the increase violated Sec. 8(a)(3), but the judge dismissed the allegation and the General Counsel has not excepted to the dismissal.

¹⁰ The record indicates that Hall's loaded forklift was raised above the production floor by means of a cable.

The same evening you received your 90-day Action Plan (at 7:40 p.m. on 2/12/99) you were in the break room on personal business and not doing your job duties. This is just prior to shift change and a very busy period. This is also not a break time.

William, in your reviews given you in July 1998, December 1998, and in your 90-day Action Plan were specific issues causing the “needs improvement” evaluation. One of the specific issues listed in your 90-day Action Plan was “spending unproductive time in Operations (no reason to be there) instead of . . . cleaning, organizing, etc. [in the warehouse]. “Spending time doing unproductive work (computer, office, etc.), and not taking care of needed work in the warehouse.”

As a result of your continuing to spend unproductive time and not working on tasks required by the Material Handler Position, you are being suspended without pay for a period of 2 days. This type of performance cannot be tolerated and will result in termination if not corrected.

Hall again disagreed with the discipline, but did not deny the alleged conduct. He wrote that “[t]his is due to being affiliated with the Union and letting someone else see a piece of paper that was not due to union activities. I do not believe this warning is correct.” The Respondent particularly required employees to be at their stations during the period immediately before shift change, so that they would be available to consult with employees on the next shift about work issues or problems.

The judge noted that the performance problems the Respondent cited to Hall had nothing to do on their face with the February 6 handbilling incident or with Hall’s failure to come in to work as a substitute. He concluded, however, that, although the reasons asserted by the Respondent constituted legitimate bases for imposing discipline, the Respondent failed to establish that it would have taken the same action against Hall if he had not been engaged in union activities. We disagree, and find instead that the Respondent has demonstrated that it would have imposed the same discipline even in the absence of the February 6 handbilling.¹¹

With respect to the February 12 warning and 90-day Action Plan, Hall admitted that, as the warning asserted, he searched out, recorded, and reported the minor errors

of other employees on a daily basis. Focusing on this admitted conduct, we find that it would be difficult to tolerate the mischief that such conduct could cause without taking action. As stated in the warning given to Hall, the Respondent took the view that Hall was searching out these errors simply as a way of “pointing the finger” at other employees. This appears to be a reasonable assessment, especially in light of Hall’s own costly production error in late 1998. We conclude that Hall’s conduct presented the Respondent with clear cause for imposing discipline and that the Respondent lawfully placed Hall on notice that the failure to correct his shortcomings would result in further discipline.

We find that the Respondent has also demonstrated that it would have suspended Hall even in the absence of his protected activity. In this regard, rather than addressing and correcting his production problems, Hall left his workstation immediately before a scheduled shift change on the same evening he received the February 12 warning. It is undisputed that the Respondent prohibits employees from taking breaks at or near the end of their shifts, as they are frequently required to confer with employees arriving for work. Hall admitted that he was away from his area, but testified that his absence was briefer than the Respondent claimed and that he could be reached by radio at all times. In our view, Hall’s equivocations do not alter the fact that on the heels of a serious warning of further discipline, including possible termination, if he failed to mend his ways, he left his work station at a time he knew that his presence was required. We find that a far stronger causal connection exists between Hall’s suspension and his absence from his work area immediately after he received a written warning than between the suspension and Hall’s February 6 handbilling, the one instance of protected conduct asserted by the General Counsel as the reason for the discipline.

We further find that the documentation of Hall’s performance issues as set out in his appraisals and in the warnings he received supports the Respondent’s assertion that it would have disciplined him in the absence of his union activity. Thus, we find the facts here distinguishable from *Lampi LLC*, 327 NLRB 222 (1998), enf. denied 240 F.3d 931 (11th Cir. 2001), on which the judge relied. The record demonstrates that the Respondent began alerting Hall to problems with his performance before the advent of the Union. It reiterated this message in December, lawfully withheld the merit portion of Hall’s wage increase in January, and warned him again in February before finally suspending him on February 22. In *Lampi*, the Board examined the respondent’s work rules and documentation in connection with

¹¹ In so finding, we note that Hall testified that he was notified verbally before the handbilling incident that he would be placed on a 90-day Action Plan. Although the Respondent does not rely on it, we find that this testimony is further evidence that the Respondent would have imposed the Action Plan and suspended Hall even in the absence of his protected activity.

the discharge of a union supporter, and found that the termination was inconsistent with the procedures set out in the employee handbook and its treatment of other employees. In this case, we do not find dispositive the Respondent's failure to show that its discipline of Hall paralleled its treatment of other employees. Some aspects of Hall's conduct do not admit of ready comparison with other employees. Thus, Hall's production error was more serious than that of any other employee, and his reaction to that error—attempting to catch other employees in production mistakes—is unlikely to find a parallel in the conduct of other employees. In addition, the Respondent's warning and suspension of Hall for repeating conduct previously pointed out as deficient is consistent with progressive discipline.

Thus, with respect to both the warning and the suspension of William Hall in February 1999, the evidence shows that, under *Wright Line*, 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir.1981), cert. denied 455 U.S. 989 (1982), the Respondent would have disciplined Hall even in the absence of his union activities. Thus, we dismiss these allegations, and have revised the Order and notice accordingly.

ORDER

The National Labor Relations Board orders that the Respondent, Albis Plastics, Rosenberg, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees concerning their union and/or protected, concerted activities.

(b) Threatening employees with the loss of a scheduled wage increase if the employees vote to be represented by a union.

(c) Threatening employees with adverse action unless they stopped engaging in union organizing activities.

(d) Advising employees that the Respondent is establishing or had established a committee, staffed by members of management and employees, which had the purpose or performed the function of soliciting grievances from employees and/or promising unspecified benefits.

(e) Notifying employees of the meetings of the committee described in paragraph 1(d), above.

(f) Taking an employee's union and/or protected, concerted activities into account as a negative factor when evaluating that employee's job performance or in preparing the employee's job performance appraisal.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the appraisal given to employee William Hall on about December 21, 1998, expunge all references to it from its files, and prepare a new performance ap-

praisal which does not take into account William Hall's union and/or protected, concerted activities.

(b) Within 14 days after service by the Region, post at its Rosenberg, Texas facility copies of the attached notice marked "Appendix."¹² Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 1, 1998.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. August 27, 2001

Peter J. Hurtgen, Chairman

Wilma B. Liebman, Member

John C. Truesdale, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

¹² If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT interrogate employees concerning their union and/or protected, concerted activities.

WE WILL NOT threaten employees with the loss of a scheduled wage increase if the employees vote to be represented by a union.

WE WILL NOT threaten employees with adverse action unless they stop engaging in union organizing activities.

WE WILL NOT advise employees that we are establishing or had established a committee, staffed by members of management and employees, which had the purpose or performed the function of soliciting grievances from employees and/or promising unspecified benefits.

WE WILL NOT notify employees of the meetings of the committee described above.

WE WILL NOT take an employee's union and/or protected, concerted activities into account as a negative factor when evaluating that employee's job performance or in preparing the employee's job performance appraisal.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind the appraisal given to employee William Hall on about December 21, 1998, expunge all references to it from our files, and prepare a new performance appraisal which does not take into account William Hall's union and/or protected, concerted activities.

ALBIS PLASTICS

Robert G. Levy, II, Esq., for the General Counsel.

Matthew L. Hoeg, Esq. and Lizzette Palmer, Esq. (Mayor,

Day, Caldwell & Keeton, L.L.P.), of Houston, Texas, for the Respondent.

Mr. Doug Fennel, for the Charging Party.

BENCH DECISION AND CERTIFICATION

STATEMENT OF THE CASE

KELTNER W. LOCKE, Administrative Law Judge. I heard this case on May 17–19, 1999, in Houston, Texas. After the parties rested, I heard oral argument, and on May 20, 1999, issued a bench decision pursuant to Section 102.35(a)(1) of the Board's Rules and Regulations, setting forth findings of fact and con-

clusions of law. In accordance with Section 102.45 of the Rules and Regulations, I certify the accuracy of, and attach hereto as "Appendix A," the portion of the transcript containing this decision. The remedy, Order, and notice provisions are set forth below.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act, including posting the notice to employees attached hereto as Appendix B.

The Respondent must also rescind the job performance evaluation which it issued to employee William Hall on about December 21, 1998, and conduct a new evaluation of Hall which does not take into account, and which is unaffected by, any union or other protected, concerted activities in which Hall has engaged.

Respondent must rescind the disciplinary warning it issued to William Hall on about February 12, 1999, and expunge all references to it from Respondent's personnel and other files.

Further, Respondent must rescind the suspension it issued to William Hall on about February 22, 1999, expunge all references to it from Respondent's personnel and other files, and make Hall whole, with interest, for any losses he suffered because of this unlawful suspension.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹

ORDER

The Respondent, Albis Plastics, Rosenberg, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees concerning their union or other protected, concerted activities.

(b) Instructing employees to remove union stickers from their headgear.

(c) Threatening employees with loss of a scheduled wage increase if the employees voted to be represented by the Union.

(d) Threatening employees with adverse action unless they stopped engaging in union organizing activities.

(e) Advising employees that Respondent was establishing or had established a committee, staffed by members of management and employees, which had the purpose or performed the function of soliciting grievances from employees and/or promising unspecified benefits.

(f) Notifying employees of the meetings of the committee described in subparagraph 1(e), above.

¹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(g) Taking an employee's union and/or protected, concerted activities into account when evaluating that employee's job performance or in preparing the employee's job performance appraisal.

(h) Issuing a disciplinary warning to an employee because that employee had engaged in union and/or protected, concerted activities, or to dissuade employees from engaging in union activities or other protected, concerted activities.

(i) Suspending an employee because the employee had engaged in union and/or protected, concerted activities, or to dissuade employees from engaging in union activities or other protected, concerted activities.

(j) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the disciplinary warning which it issued to employee William Hall on February 12, 1999 and the suspension it issued to William Hall on February 22, 1999, and expunge all references to these disciplinary actions from Respondent's personnel and other files.

(b) Make employee William Hall whole, with interest, for all losses he suffered because of Respondent's unlawful discrimination against him.

(c) Preserve and, within 14 days of request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its facility in Rosenberg, Texas, and at all other places where notices customarily are posted, copies of the attached notice marked "Appendix B."² Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees customarily are posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

² If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Dated Washington, D.C. June 23, 1999

APPENDIX A

BENCH DECISION

PROCEEDINGS

JUDGE LOCKE: This is a bench decision in the case of Albis Plastics, which I will call the Respondent or the Employer, and United Steelworkers of America, District 12, AFL-CIO-CLC, which I will call the Charging Party or the Union.

The case numbers are 16-CA-19615, 16-CA-19615-2, 16-CA-19615-3, 16-CA-19615-5, 16-CA-19615-6, 16-CA-19758, and 16-CA-19758-2.

This decision is issued pursuant to Section 102.35, subparagraph 10, and Section 102.45 of the Board's Rules and Regulations.

This litigation began on January 29, 1999, when the Regional Director of Region 16 of the National Labor Relations Board, acting for the General Counsel of the Board, issued an Order Consolidating Cases, Consolidated Complaint, and Notice of Hearing in Cases 16-CA-19615, 16-CA-19615-2, 16-CA-19615-3, and 16-CA-19615-5.

I will refer to the General Counsel for the Board as the General Counsel or simply as the Government.

The General Counsel, through the Regional Director of Region 16 of the Board, issued a second Order Consolidating Cases, Consolidated Complaint, and Notice of Hearing on April 27, 1999. For simplicity, I will refer to this document as the Complaint. Respondent filed an Answer to this Complaint on May 12, 1999, and I will refer to this pleading as Respondent's Answer.

At hearing, the General Counsel orally amended paragraph 16 of the Complaint in the manner which I will describe later in this decision. The Respondent denied the allegations in the amended paragraph 16.

The events in this case arose during a union organizing campaign at the Respondent's facility. The General Counsel alleges that the Respondent interfered with, restrained and coerced employees in the exercise of their rights under Section 7 of the Act by making a number of unlawful statements.

According to the Complaint, certain of these statements concern the formation of a committee composed of employees and managers known as the Action Committee or the Employee Action Committee.

General Counsel contends that announcement of the creation of this committee had an unlawful impact on employee rights protected by Section 7 of the Act, in violation of Section 8(a)(1) of the Act.

The Complaint does not allege that formation of this committee violated Section 8(a)(2) of the act, and the General

Counsel has not requested that the Board order the committee dissolved or disbanded.

In addition to the allegations that Respondent made statements to employees which violated Section 8(a)(1) of the Act, the Complaint also alleges that the Company discriminated against an employee who was active on behalf of the union, in violation of subsections 8(a)(1) and (3) of the Act.

Specifically, the Complaint as amended at hearing alleges that about December 21, 1998, the Respondent issued to this employee a performance appraisal which improperly considered conduct protected by the National Labor Relations Act, resulting in the employee being denied a 25-cent hourly raise.

The Complaint further alleges that about February 12, 1999, Respondent issued a disciplinary warning to this employee; then suspended him on February 22, 1999, to dissuade employees from engaging in union activities or other concerted protected activities.

I find that the Respondent has violated the Act, Sections 8(a)(1) and (3) of the Act, in certain of the ways alleged in the Complaint, but not in all of them.

I'll begin my discussion of the facts with the uncontested allegations. The Complaint alleges, the Respondent admits, and I find that the charges in this proceeding were filed by the Union on November 3, 1998; November 20, 1998; December 2, 1998; January 6, 1999; January 14, 1999; March 31, 1999; February 16, 1999; April 21, 1999; and February 26, 1999, respectively.

All of these charges and amended charges were served on Respondent by first-class mail on the date of filing, except that the charge in case 16-ca-19758-2 and the amended charge in case 16-ca-19758 were served on Respondent by first-class mail the day after they were filed; that is, on February 26, 1999, and April 22, 1999, respectively.

In its Answer, the Respondent has admitted certain allegations. Based upon those admissions and the record as a whole, I make the following findings:

At all times material to this case, Respondent, a Texas corporation, has maintained an office and place of business in Rosenberg, Texas, where it processes materials used to manufacture plastic products.

During the past 12 months, a representative period, Respondent, in conducting these business operations, purchased and received goods and materials valued in excess of \$50,000 directly from points and places located outside the state of Texas. At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

Paragraph 6 of the Complaint alleges that a number of individuals are Respondent's supervisors within the meaning of Section 2(11) of the Act and its agents within the meaning of Section 2(13) of the Act. Respondent has admitted these allegations. I find that the General Counsel has proven the allegations in paragraph 6 of the Complaint.

More specifically, I find that the following persons are Respondent's supervisors and agents within the meaning of Sections 2(11) and 2(13) of the Act respectively: quality assurance manager John Beaton; production manager Mark Neville; supervisors Daniel Garcia and Joe Schochler; general manager of operations James Craig; logistics manager Robert LaVigne; warehouse supervisor George Jackson; production manager Leroy West; and supervisors Mark McGrew and Jesse Rodriguez.

Respondent has neither admitted nor denied the allegation in Complaint paragraph 5 that the Charging Party is a labor organization within the meaning of Section 2(5) of the Act. However, based on the record as a whole, I find that the Government has proven this allegation.

Now I will take up the disputed allegations in the order they appear in the Complaint. Paragraph 7 of the Complaint alleges that, "On or about October 15, 1998, Respondent, by Jesse Rodriguez, interrogated an employee concerning her union activity."

One of Respondent's employees Juanita Guerrero, who works in the lab pigment room, testified that one evening another employee, Lealand Conklin, asked her to sign a union authorization card. The evidence indicates this conversation took place sometime in October 1998.

A brief statement signed by Ms. Guerrero and introduced as Respondent's Exhibit 1 indicates that the date of her encounter with Mr. Conklin was October 23, 1998, but on cross-examination, she was not sure of the date.

According to Ms. Guerrero, after giving her a card, Mr. Conklin came back to her work station and repeatedly talked with her about it. Mr. Conklin admitted giving Ms. Guerrero a union authorization card, and in fact, testified that he gave her such a card on two occasions. However, he denied visiting her work station repeatedly to talk with her about it.

It is not necessary to determine which witness gave the more accurate testimony on this point, because the Answer to that question is collateral to the issues raised by the Complaint.

According to Ms. Guerrero, she was sufficiently upset by Mr. Conklin's persistence that she complained to her supervisor about it. Ms. Guerrero testified that she initiated this conversation with her supervisor, Jesse Rodriguez, and explained it to him. She further testified that Mr. Rodriguez then asked her if she did sign the card, but that Mr. Rodriguez did not ask her who gave the card to her.

Also present during Ms. Guerrero's conversation with Supervisor Rodriguez was Ivan Trevino, an employee supervised by Mr. Rodriguez. His testimony directly contradicts that of Ms. Guerrero on crucial points.

Contrary to Ms. Guerrero, Mr. Trevino testified that Supervisor Rodriguez initiated a conversation about the union cards. Mr. Trevino also testified that Supervisor Rodriguez asked Ms. Guerrero if he, meaning Mr. Trevino, had given the card to her. According to Mr. Trevino, she said, No, and then Mr. Rodri-

guez asked who gave it to her, and she identified Lealand Conklin.

On one point, the testimony of Ms. Guerrero and Mr. Trevino agrees. Mr. Trevino testified that Supervisor Rodriguez asked Ms. Guerrero if she had signed the union card, and she said she did.

However, I must decide which testimony to believe on other major points. Both Mr. Trevino and Ms. Guerrero are employed by the Respondent. There might well be more incentive or at least more perceived incentive for an employee to give testimony which helps his boss win. As the General Counsel pointed out in oral argument, it is possible to resolve the credibility conflict on that basis.

However, I have decided to credit the testimony of Mr. Trevino rather than Ms. Guerrero for a more fundamental and more compelling reason. Three people heard this conversation: Ms. Guerrero, Mr. Trevino, and Supervisor Rodriguez. We may visualize Ms. Guerrero's testimony as a weight on one side of the scales of justice and Mr. Trevino's as an equal weight on the other side. But where is the testimony of Mr. Rodriguez?

We can be pretty sure that the testimony of Mr. Rodriguez is going to support one side or the other, but not both. He cannot both have asked Ms. Guerrero who gave her the union card and also not have asked her that question. In this case, at least, that point at the apex of the scales of justice is too sharp to straddle.

Mr. Rodriguez did not testify at all. Because the Complaint alleges and Respondent has admitted that Mr. Rodriguez is a supervisor and agent, his words are attributable to the Respondent. I believe that his silence is too.

Mr. Trevino testified as the General Counsel's witness on the first day of hearing. Thus, Respondent was on notice of the need to refute this testimony. Although Respondent did call Ms. Guerrero, it did not call the one witness most able to tell us what Mr. Rodriguez said, namely Mr. Rodriguez himself.

If Mr. Trevino had fabricated his testimony, the normal human reaction we might expect from the person lied to or lied about would be to demand his day in court. That is particularly true when the lie accuses a person of violating a law. Even if the victim of such a lie doesn't actually paw the ground and breathe out steam, we may assume that he will be eager to take the stand and set the record straight.

Therefore, I would be reluctant to conclude that the absence of Mr. Rodriguez from the witness stand was simply due to shyness on his part. However, I will not jump to the conclusion that Supervisor Rodriguez actually has been informed of Mr. Trevino's testimony, although the sequestration order expressly permits the Respondent's counsel to do so.

On the other hand, Respondent itself, by its presence in the courtroom, was aware of Mr. Trevino's testimony and the need to refute it. Respondent's failure to corroborate the testimony of its one witness, Ms. Guerrero, with the testimony of another witness under its control tips the balance. I credit the testimony of Mr. Trevino rather than Ms. Guerrero.

I find that Supervisor Rodriguez initiated the conversation with Ms. Guerrero; that he asked her if she signed a union card; and that he asked her who gave her that card.

In *Smith and Johnson Construction Company*, 324 NLRB No. 153, decided October 31, 1997, the Board affirmed the Administrative Law Judge's analysis of certain statements alleged to violate Section 8(a)(1) of the Act. The Judge had described the framework for that analysis in these terms:

In deciding whether interrogation is unlawful, I'm governed by the Board's decision in *Rossmore House*, 269 NLRB 1176 (1984). In that case, the Board held that the lawfulness of questioning by employer agents about union sympathies and activities turned on the question of whether, "Under all circumstances, the interrogation reasonably tends to restrain or interfere with the employees in the exercise of rights guaranteed by the Act." The Board in *Rossmore House* noted the [test set forth in *Bourne Co. v. NLRB*, 332 F. 2d 47, (2d Cir. 1964)] was helpful in making such an analysis. The *Bourne* test factors are as follows:

1. The background, i.e. is there a history of employer hostility and discrimination?
2. The nature of the information sought, e.g. did the interrogator appear to be seeking information on which to base taking action against individual employees?
3. The identity of the questioner, i.e. how high was he in the Company hierarchy?
4. The place and method of interrogation, e.g. was employee called from work to the boss's office? Was there an atmosphere of "unnatural formality"?
5. Truthfulness of the reply.

In this case, the record does not establish a history of employer hostility and discrimination before the present union organizing drive. However, as I will discuss, the record does establish that Respondent violated the law on several occasions during that drive.

The nature of the information sought, namely whether one employee had signed a union card and the identity of the employee proffering that card, is highly sensitive. Seeking such information predictably has a chilling effect on the exercise of rights guaranteed under the Act.

Additionally, it is somewhat difficult to understand why the Respondent's managers would have Ms. Guerrero sign the statement introduced into evidence as Respondent's Exhibit 1, unless Respondent contemplated disciplinary action against the employee who gave Ms. Guerrero the card.

The questioner was on the lower end of the management hierarchy, but it was he who initiated the conversation. It is not clear whether Ms. Guerrero responded truthfully to his questions, but I believe it is more likely than not that she may have exaggerated how often Mr. Conklin approached her to discuss the union card. After all, she admitted to Mr. Rodriguez that she had signed a card herself, but then claimed she did so, in

the words of Respondent's Exhibit 1, "to put a stop to the constant barrage of pressure."

The Board applies an objective standard to determine whether or not a particular statement interferes with, restrains, or coerces employees in the exercise of protected rights. Therefore, whether or not Ms. Guerrero felt intimidated or coerced does not determine the legality of the interrogation.

It may be noted, however, that Respondent's Exhibit 1, the statement which Ms. Guerrero gave to the Respondent, makes the coercive nature of the questions pretty obvious. The fact that she felt a need to explain why she had signed a union card, which is activity clearly protected by the labor law, demonstrates the chilling effect of the questions that Mr. Rodriguez asked.

I find that Respondent violated Section 8(a)(1) of the Act in the manner alleged in paragraph 7 of the Complaint.

Paragraphs 8, 9, and 10 of the Complaint concern the Respondent's policy that employees may not put unauthorized stickers on the protective head gear, called bumpcaps, which it issues to employees. Specifically, Complaint paragraph 8 alleges that, "On or about October 9, 1998, Respondent, by Mark Neville instructed employees to remove their union stickers from their hard hats."

Complaint paragraph 9 alleges that, "On or about a date in early November 1998, the precise date which is currently unknown to the Regional Director, and again on or about February 17, 1999, Respondent by Leroy West, instructed employees to remove their union stickers from their hard hats."

Complaint paragraph 10 alleges that, "About February 14, 1999, Respondent, by Daniel Garcia, instructed employees to remove their union stickers from their hard hats."

Most of the facts are not in dispute. The record clearly establishes that ever since it began providing the bumpcaps to employees in May 1994, the Respondent has had a policy that employees cannot mark on the bumpcaps or put stickers on them, except for certain work-related stickers it has authorized.

The Respondent now authorizes stickers to indicate three things: That an employee has received training in first aid and CPR; that an employee is a member of the plant safety committee; or that an employee has been certified as qualified to drive a forklift. No one disputes that those are the only stickers officially sanctioned.

Additionally, Respondent stipulated at the hearing that every employee who wore a union sticker on his bumpcap was asked to remove it. That fact is not in dispute.

There does appear to be some disagreement between the Respondent and General Counsel as to how strictly Respondent enforced its no-sticker policy in the past, when the stickers had nothing to do with the union or the organizing campaign. Even on this question, the record presents a pretty consistent picture.

Respondent's employees have worn bumpcaps for five years. I find that during that time, Respondent never varied from its

policy that only authorized stickers could be placed on the bumpcaps.

On the other hand, Respondent did not give its sticker policy a top priority. It did not go after unauthorized stickers the way Captain Ahab went after the great white whale. Thus, the evidence does not paint a picture of employees lined up every morning for inspection by a supervisor with riding crop and monocle. We don't see an employee dropping to do 50 push-ups because he cut out a Shell Oil logo and pasted it to his hat.

The record establishes that from time to time, a worker placed an unauthorized marking or sticker on his bumpcap and that sooner or later, a supervisor would tell him to take it off. The "later" might be a month later when the supervisor happened to notice it.

On the other hand, the Respondent made clear from early in the union organizing campaign that union stickers were not to appear on bumpcaps.

With respect to Complaint paragraph 8, former employee Paul Allen Lyle testified that Mark Neville, the Respondent's production manager, asked Mr. Lyle to remove a union sticker from his bumpcap. He also testified that a supervisor, Daniel Garcia, wore an unauthorized sticker, unrelated to the union, on his bumpcap and continued to do so for two or three months after Manager Neville told Lyle to remove the union sticker from his headgear.

To the extent that Lyle's testimony conflicts with that of Garcia, based upon my observations of the witnesses, I credit the testimony of Mr. Lyle.

With respect to Complaint paragraph 9, senior production supervisor Leroy West testified that he has asked employees to remove stickers from the bumpcaps which the company issued to them. Some, but not all, were union stickers. I credit this testimony.

With respect to Complaint paragraph 10, shift supervisor Daniel Garcia denied ever telling an employee to remove something from the employee's bumpcap. About three-and-a-half years ago, he tried putting an unauthorized sticker on his bumpcap, and it stayed there for about a month before a supervisor told him to remove it. However, Mr. Garcia denied wearing an unauthorized sticker on his bumpcap in 1998. Based upon my observation of the witnesses, I credit Mr. Garcia's testimony.

In sum, I find that the Government has proven the allegations in paragraphs 8 and 9 of the Complaint, but has not proven the allegations in paragraph 10 of the Complaint. The credited evidence, together with Respondent's stipulation, clearly establishes that Respondent did not allow its employees to put union stickers on bumpcaps and clearly conveyed this policy to employees during the union organizing campaign.

More than 50 years ago, the Supreme Court recognized that the Act protects the right of employees to wear union emblems while at work, but that this right is not absolute. An employer may demonstrate legitimate business reasons for restricting employees' rights to display union insignia on their clothing

while working. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945). As I will discuss later, the Employer bears the burden of proving that there are such legitimate business reasons and that these reasons are sufficiently important to justify a restriction on the employees' Section 7 rights.

In this case, the Company advances several arguments to show that its prohibition was justified. One argument concerns safety. The Company contends that the three types of authorized stickers must be clearly visible, so that they could be spotted quickly at a distance.

For example, members of the safety committee have received training on how to lock down, that is, to shut down machinery without causing a safety hazard. Failing to follow such procedures might result in a machine releasing stored energy at the wrong time, causing an injury. Therefore, the Respondent argues, an employee seeking to shut down a machine needs to be able to spot a safety committee member right away and at a distance, so that the safety committee member can be present to do the lock-down properly. The committee member can be identified by the distinctive sticker on his bumpcap.

Similarly, if an employee suffers an injury or heart attack, he or fellow workers need to be able to find the person trained in first aid and CPR without delay. That individual also wears a distinctive sticker on his bumpcap.

The Occupational Safety and Health Administration requires the employer to train and certify forklift drivers, before allowing them to operate such machinery. A distinctive sticker on the certified operator's bumpcap allows supervisors and others nearby to determine quickly if someone without the required training is at the controls.

All of these arguments are cogent and logical. Additionally, the parties stipulated that the work environment is such that serious work injuries or illnesses can occur that require immediate first aid or CPR.

However, and notwithstanding that these arguments are logical, I do not believe that the arguments are sufficient to carry the Respondent's burden. In my view, there is a missing element. To meet its burden, Respondent needed to show not merely that the asserted reasons were logical, but that they compelled the restriction on employee rights.

However, the evidence does not demonstrate that a total ban on union buttons was necessary to assure the visibility of the authorized stickers, which others needed to see in an emergency. There is no proof that the Respondent could not have accomplished its goal just as effectively by limiting the size, shape, or color of nonauthorized stickers, or by specifying where on the bumpcap the unofficial stickers could be attached.

Similarly, the evidence does not establish that there has ever been an actual problem in spotting the official stickers because of the presence of other emblems. Moreover, the evidence does not establish that this safety concern created the need for Respondent's rule or caused Respondent to promulgate it.

I find that these reasons are not sufficient to justify the restriction on employees' Section 7 rights.

Respondent also notes that it owns the bumpcaps. It issues a bumpcap to an employee, but the employee returns it to the company when he retires or quits or is discharged. Since the employee retains the bumpcap during his employment, however, it is difficult to see how putting a sticker on the headgear harms the Respondent's ownership interest in the cap, so long as the sticker can be removed without harming it.

By analogy, I can see how a landlord might specify the type of nail or device I may use to hang a picture in an apartment when he rents it to me. The type of device used to hang a picture conceivably could damage the wall and therefore harm the landlord's property interest in the wall.

On the other hand, the landlord's property interest is much more attenuated when he starts telling me what kind of a picture to hang. It affects the wall equally whether I put up a print of the Mona Lisa or of dogs playing poker.

Similarly, the evidence does not establish that glue on the union stickers damages the finish of the bumpcaps any more than the glue on the authorized stickers. Indeed, the Respondent has not demonstrated that unauthorized stickers physically harm the bumpcaps and hasn't even made that claim.

Likewise, Respondent has not asserted that a fear of harm to its property prompted the restriction on placing stickers on it. I must reject the argument that a property interest in the bumpcap justifies the ban on union stickers on the bumpcaps.

Respondent further notes that the restriction it imposed applies only to the bumpcaps and that employees are free to display union insignia elsewhere on their clothing, including on the uniform shirts which Respondent provides for their use during work.

This argument, however, I believe, goes more to the amount of harm caused by the restriction, rather than to any justification for it.

Moreover, in the arena of a union organizing campaign and union election, much depends on psychology, or at least labor relations professionals pay considerable attention to psychology. I believe that the Board properly may take administrative notice of such psychological factors, because Congress created it to be knowledgeable about labor relations and to exercise a special expertise in that field.

When it conducts a representation election, for example, the Board recognizes the importance of maintaining laboratory conditions in which employees can make a free and uncoerced choice by secret ballot. The psychological environment is highly important, and the law prohibits both the making of threats and the promise of benefits which can corrupt this environment.

In arguing a different point in this same case, the General Counsel observed that when an employer confronting a union campaign announces its own employee committee to address grievances, it sends the powerful message that a union is not

necessary. Similarly, an employer opposing a union campaign may seek to portray the union as weak or ineffectual, and to make clear that the employer alone is in control.

In this light, when an employer tells its workers that they may wear union emblems on some articles of their clothing but not on another article of apparel, the message it sends to employees is no less harmful than the message conveyed by a total ban on the wearing of union insignia.

In either case, such an employer is asserting the power to curtail rights which have been established by law. And when an employer imposes only a partial limitation, saying, in effect, "you may wear this emblem on your shirt but not your hat," it may also imply that the freedom to express support for a union is not a matter of legal right at all, but instead depends on the grace of the employer, which is free to impose restrictions as it sees fit. Therefore, I must reject the argument that a partial limitation on the wearing of union insignia is innocuous.

Since the Respondent has pointed out that it owns the bumpcaps and is asserting a property interest in how they are used, it might be tempting to draw an analogy to cases in which an employer's property interests are balanced against the right of employees to be in contact with union officials.

Typically such cases arise in remote areas, where employees live and work with little contact from outside. However, such cases are not apposite here. They involve employees' Section 7 right to receive information from union representatives.

By comparison, the Section 7 right at issue here is an employee's right to express support for a union by wearing a sticker. A partial restriction on that freedom can be every bit as chilling as an outright ban. Therefore, an employer must demonstrate persuasive reasons to justify even a partial limitation.

Even though the restriction here is limited to the bumpcaps, it still represents an employer's attempt to control and limit the exercise of rights of expression guaranteed under the law. The fact that the Employer did not seek total control cannot logically serve as a justification for seeking partial control over how employees exercise their statutory rights. Rather, any justification for such a limitation must arise from the specific need for it. It is not sufficient merely to say, Things could have been worse.

In *Inman County's Legal Services*, 317 NLRB 941 (1995), the Board noted that the employer seeking to prohibit employees from wearing union insignia had the burden of proving, with substantial evidence, that special circumstances existed to justify such a ban.

Citing *Mack's Supermarkets*, 288 NLRB 1082, 1098 (1988), the Board stated that special circumstances exist if an employer can show by substantial evidence that the wearing by its employees of insignia for a union adversely affected its business or that the limitation on wearing such insignia was necessary to maintain employee discipline, and that because of deleterious effects on these interests, the employer's ban on the wearing of

such insignia outweighed the employees' statutory right to do so.

Respondent has not presented any evidence to establish that the presence of a union sticker on an employee's bumpcap adversely affected its business. The evidence offered by Respondent indicates that a problem could be created if the sticker were so large it covered up one of the stickers which needed to be visible.

However, Respondent has not shown that the union stickers worn by some employees on their bumpcaps ever caused this problem. Respondent also has not presented evidence showing that allowing such stickers on bumpcaps would disrupt employee discipline or have any kind of deleterious effect on its business.

Therefore, I conclude that Respondent has failed to meet its burden. Further, I conclude that by prohibiting employees from putting union stickers on their bumpcaps, Respondent violated Section 8(a)(1) as the Complaint alleged.

Complaint paragraph 11 alleged as follows: "On or about November 29 and December 1, 1998, Respondent by James Craig threatened employees with the loss of a scheduled wage increase if the employees voted to be represented by the Steelworkers union."

Although the record contains testimony from a number of witnesses about what Respondent's general manager of operations, James Craig, said to employees during meetings on November 19 and December 1, 1998, I find that the most reliable evidence comes from Mr. Craig himself. Based on his demeanor while testifying, I conclude that Mr. Craig was a conscientious and reliable witness.

During his testimony on May 19, 1999, Mr. Craig admitted that he told employees that if the union won the election, wages would be frozen at the status quo. This statement is not a correct explanation of an employer's duty under the labor law.

Moreover, its chilling effect on employee rights becomes greater when it is considered in context.

Mr. Craig's testimony establishes that he also told employees that the company planned to go ahead with pay increases it had scheduled for January 1999, but then, picking up a union campaign flyer, said that the company had to be careful. To that, he added the statement that if the union won the election, the wages would be frozen.

The obvious effect of these statements is to present employees with the apparent choice of a wage increase if they did not select the union or a wage freeze if they did. Applying the Board's objective standard, I find that this statement clearly interfered with, restrained, and coerced employees in the exercise of their Section 7 rights, in violation of Section 8(a)(1) of the Act.

Mr. Craig's choice of words may have been entirely innocent. He testified that he made the statement to employees without first asking for legal advice, and he was reacting to the

letter of a union attorney, which the Union had reprinted on the back of its campaign flyer.

This letter included the sentence, "Once a majority of employees designates the union as their bargaining agent, an employer may not change any existing terms and conditions of employment without the consent of the union membership."

This statement was only a very brief and partial explanation of principles established by long and complicated case law. But in isolation, it seems to support Mr. Craig's statement to employees that if the union won the election, wages would be frozen.

It is not necessary to decide whether Mr. Craig seized on this statement in the union attorney's letter and tried to turn it to the company's advantage or whether he was genuinely confused by this subtle and, indeed, confusing part of the labor law. However, it does not matter. Improper motivation is not an element needed to establish a violation of Section 8(a)(1) Act. Rather, the Board looks at what effects a statement reasonably would be expected to have on employees in their exercise of Section 7 rights.

Applying such an objective standard, I find that the statement violated Section 8(a)(1) of the Act.

Complaint paragraph 12 alleges that, "On or about December 5, 1998, Respondent, by Robert LaVigne threatened an employee with adverse action unless he stopped engaging in organizing activities."

Respondent has admitted that Robert LaVigne, its logistics manager, is its supervisor and agent. William P. Hall works for Respondent as a material handler and is under Mr. LaVigne's supervision. Mr. Hall is also an active union supporter. His union activities include soliciting employees to sign authorization cards and distribution union leaflets.

Mr. Hall testified that in December 1998, he had a conversation with Mr. LaVigne in the manager's office. Also present was warehouse supervisor George Jackson. According to Mr. Hall, Mr. LaVigne made references to Mr. Hall harassing another employee. However, Mr. LaVigne refused to tell Mr. Hall the name of the employee who had been complaining that Mr. Hall had harassed him. Additionally, Mr. LaVigne was very vague about what he meant by the term "harassment."

According to Mr. Hall, Mr. LaVigne told him that if he did not stop the harassment, his "ass would be up a crack." In later encounters with Mr. LaVigne, Mr. Hall persisted in trying to learn the name of the employee who had complained about harassment, but Mr. LaVigne refused to identify the employee.

Mr. Hall had a little more success in learning what Mr. LaVigne meant by the word "harassment." Mr. Hall testified that in a subsequent conversation, he asked Mr. LaVigne if the claimed harassment pertained to a safety issue, and Mr. LaVigne said that it did not. Mr. Hall then asked whether it pertained to the union, and Mr. LaVigne said that it did.

Although Mr. LaVigne testified, the third person who heard this conversation, George Jackson, did not. Respondent has

admitted that Mr. Jackson is its supervisor and agent, and the record gives no explanation why Mr. Jackson, who presumably was available to Respondent, did not testify.

Additionally, I was impressed by Mr. Hall's demeanor as a witness. He was not glib or polished, but he appeared to be telling the truth. Therefore, and noting that Respondent did not call Mr. Jackson to corroborate Mr. LaVigne's testimony, where that testimony conflicts with Mr. Hall's, I will credit Mr. Hall's.

A Complaint by employee Jose DeLeon apparently prompted Mr. LaVigne to call Mr. Hall and ask him about it. From Mr. DeLeon's testimony, however, it appears that he was upset, not because Mr. Hall had harassed him, as that term is commonly used to signify abrasive or offensive conduct with a tendency to be repeated. Instead, Mr. DeLeon was upset with Mr. Hall because he believed Mr. Hall had lied to him.

According to the testimony of Mr. DeLeon, Mr. Hall had asked him to sign a union authorization card. Mr. DeLeon could not recall when Mr. Hall made this request.

Mr. DeLeon replied that he would take a card, but that he was not going to sign it. Mr. DeLeon testified that Mr. Hall then told him that if he did not sign the card, he would not be allowed to vote in the election. In Mr. DeLeon's words, Mr. Hall had told him, "If I didn't sign it, then later on, I did not have a choice to vote yes or no."

Doubting what Mr. Hall had told him, Mr. DeLeon went to two members of management, Mr. LaVigne and Mr. Jackson, and asked them about it. Learning that Mr. Hall's statement to him had not been correct, Mr. DeLeon became upset that Mr. Hall had lied to him.

In the absence of testimony by Supervisor Jackson, some details remain uncertain. However, a coherent picture of the facts does emerge.

Although Mr. LaVigne alluded rather cryptically to harassment when he talked with Mr. Hall, the situation did not involve the sort of harassment which has become increasingly and sadly familiar in the workplace, harassment in which one person repeatedly bothers another in an unwelcome manner over a period of time.

The conduct which Mr. LaVigne called harassment was simply union activity. Even assuming for the sake of analysis that Mr. Hall misrepresented the labor law to Mr. DeLeon to convince him to sign a card, the false statement would not lose its protection because it was untrue.

Mr. LaVigne's statement to Mr. Hall that if he did not stop the harassment his "ass would be up a crack" can be understood only as a veiled threat of discipline if Mr. Hall continued to engage in protected activity.

I find that the Respondent violated Section 8(a)(1) as alleged in Complaint paragraph 12.

Complaint paragraph 13 alleges that, "On or about December 16, 1998, Respondent, by Mark McGrew advised employees that it was establishing a new committee which would be

staffed by members of management and employees, which would be known as an Action Committee.”

Complaint paragraph 15 alleges that, “Subsequent to the announcement of the committee described in paragraph 13 above, Respondent issued a notice, advising that the first meeting of the committee would commence on January 19, 1999.”

Complaint paragraph 14 alleges that, “The announcement of the establishment of the committee as described in paragraph 13 above was for the purpose of soliciting grievances from employees and promising unspecified benefits.”

As I have noted earlier in this decision, the Complaint does not allege that Respondent violated Section 8(a)(2) of the Act by forming this committee, and the General Counsel does not seek a Board order requiring that the committee be dissolved or disbanded.

The record presents a very consistent picture concerning the formation of the Employee Action Committee. Factual disputes appear to be mere nibbles around the edges, for example, concerning the amount of help which management gave to the operation of the committee and the amount of involvement of supervisors in its formation and functioning.

However, I do not have to decide whether Respondent unlawfully has assisted or dominated the committee, because those are issues arising when a Section 8(a)(2) violation is alleged, and the General Counsel has not alleged such a violation.

Instead, the theory of violation focuses on the impact which the announcement of the committee would reasonably have on employees in the exercise of their Section 7 rights. Specifically, I must determine, did the announcement of the formation of the committee interfere with, restrain, and coerce employees in the exercise of those rights?

The record establishes that during the course of the union’s organizing campaign, the Respondent did announce the formation of this new Employee Action Committee. Although the evidence is not clear as to whether the Respondent played the role of father, mother, midwife, or all three, it clearly was involved in the birth of this committee. The initial notice advising employees about it tells volunteers to talk to their supervisor, to Mark McGrew or to Jim Craig, all of these being members of management.

Regardless of whether Respondent’s involvement in this committee was lawful, Respondent’s announcement of it during the union campaign was not. Applying an objective standard, this announcement reasonably would interfere with, restrain, and coerce employees in the exercise of their Section 7 rights.

I find that Respondent violated Section 8(a)(1) of the Act as alleged in paragraph 13 of the Complaint.

The Government also has established the allegation in Complaint paragraph 15 concerning issuance of a notice advising employees of the Complaint’s first meeting. Indeed, the notice itself is in evidence as General Counsel’s Exhibit 9. The earlier notice, inviting employees to volunteer for the committee, is in evidence as General Counsel’s Exhibit 8.

The language of this notice also goes far towards establishing, as alleged in Complaint paragraph 14, that the committee was established for the purpose of establishing of soliciting grievances from employees and promising unspecified benefits.

Thus, the notice begins by announcing the names of the employee volunteers who—and here I quote from General Counsel’s Exhibit 9—“would like to join together and define the role of a team, dedicated to resolving issues and improving Albis as a place to work.”

Respondent’s earlier notice inviting volunteers for the committee lists among its possible functions—and here I quote from General Counsel’s Exhibit 8—“policy and procedure changes, being a sounding board for benefits changes, assuring fairness in disciplinary proceedings, and driving improvements in working conditions.”

Those words about resolving issues and improving Albis as a place to work sound strangely like a description of a committee intended to receive and settle grievances, and somehow improve the conditions of employment. Moreover, these functions sound surprisingly like the functions of a union.

If these words of the notice left any room for doubt, the first actions of the committee made their meaning clear. The record establishes that the committee became involved in the question of compensation for hours worked, and that Respondent agreed to the improvements suggested by the committee. The General Counsel, therefore, has proven the allegations in Complaint paragraph 14. I find that Respondent’s actions described in Complaint paragraphs 13, 14, and 15 have violated the Act in the manner alleged.

Before amendment, Complaint paragraph 16 alleged as follows: “About December 21, 1998, Respondent issued an appraisal of its employee William Hall, which improperly considered conduct which, if true, was protected concerted activity, in finding fault with William Hall’s job performance.”

During the hearing, over the Respondent’s objection, I allowed the General Counsel to amend this language by adding after the word “performance” the phrase “which had the effect of depriving Mr. Hall of an additional 25-cent wage increase.”

Additionally, the General Counsel takes the position that, as part of the remedy for the allegedly unlawful appraisal, the Board should order the Respondent to grant Hall a 25-cent wage increase, and to pay him backpay for the period of time in which it failed to pay him this wage.

The Respondent objected to this amendment, asserting that the Charging Party had withdrawn such allegations from its unfair labor practice charge. Respondent placed in evidence as Respondent’s Exhibit 18 an April 23, 1999 letter it received from Regional Director Michael Dunn, pertaining to the charge in case 16-CA-19615-6.

This letter stated, in pertinent part, “This is to advise that, with my approval, the charge in the above matter has been withdrawn only as to the unfavorable job evaluations given to William Hall and Ivan Trevino on about January 1, 1999, and

as to the refusals to give merit pay increases to Hall and Trevino on about January 1, 1999.”

Procedurally, this matter is somewhat unclear. Respondent’s employee, William Hall, received a performance appraisal in late December 1998, and it appears clear that this is the job evaluation the Regional Director referred to in his April 23, 1999, letter.

Yet the Second Order Consolidating Cases, Consolidated Complaint, and Notice of Hearing which the Regional Director issued four days after his April 23, 1999, letter, alleges that Hall’s job evaluation violates the Act. However, it does not allege that Trevino’s job evaluation violated the Act.

Therefore, it is unclear to me what effect the letter announcing the partial withdrawal of allegations in the charge had on the issuance of the Complaint and the allegations in the Complaint.

The record does not establish that the Respondent will suffer any prejudice because the General Counsel amended the paragraph 16 of the Complaint in the manner allowed. Respondent has not raised any assertion that the amendment is barred by Section 10(b), and, indeed, the Respondent could not, because the six-month statute of limitations has not yet elapsed.

Respondent has not requested additional time to prepare its defense on the issue raised by the amendment, and that issue is essentially legal rather than factual in nature.

Therefore, I find that it does not violate Respondent’s due process rights to allow the amendment.

To some extent, the General Counsel has suggested that the amendment goes to remedy, rather than violation. In other words, the denial of the additional 25-cent raise is, in effect, perhaps an inevitable consequence of the ratings which Hall received on his appraisal.

Under this theory, if Respondent violated Section 8(a)(3) of the Act by considering his protected activity as a negative factor in his job evaluation, then the remedy necessarily includes restoring any wage increase he would have received, but for the discrimination against him.

However, I believe it is more appropriate to view this Complaint amendment as raising a new allegation of discrimination, specifically that Respondent discriminated against Hall by denying him the 25-cent raise. Under this approach, the Administrative Law Judge would conduct a separate *Wright Line* analysis to determine whether denial of the wage increase constituted unlawful discrimination.

An alternative approach would be to conduct only a *Wright Line* analysis concerning the original allegation in Complaint paragraph 16, which is the lawfulness of the December 21, 1998, job evaluation. If the Government proved that the job evaluation was unlawful under this *Wright Line* analysis, then the Judge would then consider and decide whether or not the unlawful evaluation resulted in the denial of the 25-cent raise.

However, I believe the better approach is to treat the denial of the 25-cent raise as a separate allegation of discrimination to be evaluated independently under the *Wright Line* framework.

Assuming that the General Counsel establishes a prima facie case, the Respondent may rebut it by showing that it would have taken the same action even in the absence of protected activity by the alleged discriminatee.

It is reasonable that the Respondent may have different business reasons for denying the raise than it would have for including the material in the appraisal.

First, I will take up the original issue raised by Complaint paragraph 16, namely, whether the performance evaluation which management gave to employee William Hall on about December 21, 1998, improperly considered activity which, if true, was protected by the Act.

The doctrine of *res ipsa loquitur*, familiar to tort lawyers, seldom becomes a topic of conversation among labor lawyers, but these Latin words, meaning that the thing speaks for itself, seem applicable to Mr. Hall’s December 21, 1998 performance evaluation found in the record as General Counsel’s Exhibit 2.

At the bottom of the third page of this document, after a notation that Mr. Hall needs improvement in interpersonal skills, the following comment appears, which I quote verbatim:

William has had issues in regards to communication with some warehouse personnel. He has persisted giving a particular point of view to warehouse personnel who are not interested. William was warned about harassing people on the job.

These words convey a very clear meaning in the context of other actions at issue in this proceeding. We may start with the last quoted sentence, namely, “William was warned about harassing people on the job.”

As alleged in Complaint paragraph 12 and established by the evidence, Respondent made an unlawful threat to Mr. Hall when Mr. LaVigne warned him that if he did not stop his harassment of other employees, his “ass would be up a crack.” However, the evidence in this case shows—and I have found—that Mr. Hall’s actions which Mr. LaVigne called harassment were not harassment at all. They were union activities, protected by the law.

Since the words “harassing people on the job” refer to Hall’s union activities, there can be no doubt about the meaning of the second sentence stating, and I will quote it again. “He has persisted giving a particular point of view to warehouse personnel who are not interested.”

Somehow it seems unlikely that this particular point of view, referred to in the appraisal, concerns some topic such as the Houston Oilers leaving town or the taste of Cincinnati-style chili. When considered together with the comment about harassing people, the words “point of view” can only refer to Mr. Hall’s support for the union, and I so find.

I will analyze the evidence under the Board’s framework in *Wright Line*, 251 NLRB 1083, a 1981 case. The evidence

clearly establishes that Mr. Hall engaged in protected activity, the first of four elements which the Government must prove to make a *prima facie* case.

The record also proves that the Respondent knew about Mr. Hall's protected activity. Mr. LaVigne's statement to Mr. Hall, affirming that the claimed harassment concerned the union, establishes that fact. So does Mr. DeLeon's testimony that he complained about Mr. Hall's union activities to management. Thus, the second step is satisfied.

At the third step, the Government must show that the Employer took some adverse employment action against the alleged discriminatee. A negative performance appraisal is such an adverse employment action.

And the words of the appraisal speak for themselves in proving the fourth element, the necessary link between the employee's protected activities and the adverse employment action.

I find that the General Counsel has established a *prima facie* case. The Respondent may rebut the *prima facie* case by showing that, for lawful reasons, it would have taken the same action against Mr. Hall, even if he had not engaged in protected activities.

As stated by the Board in *Lampi, LLC*, 327 NLRB Number 51, November 30, 1998, "To establish such an affirmative defense, an employer must do more than show that it had reasons that could warrant discharging the employee in question. It must show by a preponderance of the evidence that it would have done so, even if the employee had not engaged in protected activities."

The Board [does] not substitute its judgment concerning the seriousness of employee misconduct for the judgment of the employer. Rather, it seeks to determine what the employer would have done by examining how the employer had imposed discipline in other situations in the past, when the situations did not involve or touch upon protected activity.

Here, the Respondent has not asserted legitimate business reason for considering Mr. Hall's protected activities as a negative factor in the appraisal. It would be difficult to think of any. I conclude that Respondent has not rebutted the General Counsel's *prima facie* case. Further, I find that Respondent violated Section 8(a)(3) and (1) of the Act by this conduct.

The evidence also establishes that after making this performance appraisal of Mr. Hall, the Respondent granted a January pay raise to its employees. All but six of these employees received a 25-cent cost of living raise and 25-cent merit raise. Of the remaining six, some employees received no raise at all. Mr. Hall received the 25-cent cost of living raise but no merit pay raise.

The General Counsel's amendment to paragraph 16 seeks to tie the denial of the 25-cent merit pay increase to the unlawful appraisal. As I've already noted, I will evaluate this new allegation independently under the *Wright Line* test.

Clearly, the evidence establishes that Mr. Hall engaged in protected activities, that the Respondent knew about these activities, and that he suffered an adverse employment action. General Counsel has established the first three *Wright Line* elements, and of course, the adverse employment action in this instance is not receiving the 25-cent merit increase.

Because of the timing of the denial of the merit pay increase, and because of the other statements which violated Section 8(a)(1) of the Act and demonstrate animus towards the Union, I find that the General Counsel also has proven a link sufficient to satisfy the fourth element of the *Wright Line* test, and therefore, the Government has established a *prima facie* case.

However, I conclude that in this instance, the preponderance of the evidence does show that the Respondent would have taken the same action even if Mr. Hall had not been involved in union or other protected activities.

In oral argument, the General Counsel acknowledged that Mr. Hall had not been an exemplary employee. Indeed, Mr. Hall in his testimony admitted that he made a mistake which cost the company a significant amount of money. The Company places the amount of money lost at about \$30,000.

Mr. Hall's honesty in acknowledging this mistake is one reason I believe that his testimony is reliable. But credible testimony also indicates that Mr. Hall's mistake cost the company more money than any other employee's mistake ever had.

In accordance with the Board's *Lampi* decision, it would not be proper for me to conclude that the Respondent would have denied Mr. Hall the merit raise increase, just because under similar circumstances, I might have done so. In other words, I would err in substituting my judgment as to what I might do as an employer for the deliberative process of establishing what the Employer in this case actually would have done in the absence of protected activity. I will decline to make such a substitution of judgment.

Still, I have no doubt that the Respondent took the mistake which Mr. Hall made into account when it decided how much of a raise it should give him. It would seem extremely unusual for any employer not to take such a mistake into account.

General Manager Craig's explanation of why Respondent gave Mr. Hall a 25-cent cost of living raise sounds plausible to me. I realize that the General Counsel, in closing argument, has called into question its logic, but based upon my observations of the witnesses, I believe Mr. Craig when he described the Respondent's efforts to nudge Mr. Hall into becoming a more productive employee. Granting him part of the wage increase so that he would not have so far to catch up when he did become productive sounds eminently logical, at least to me.

Therefore, I find that Respondent would have taken the same action against Mr. Hall in any event. I recommend dismissal of the allegation raised by the oral amendment to Complaint paragraph 16.

Paragraph 17 of the Complaint alleges that on February 12, 1999, the Respondent issued a disciplinary warning to Mr. Hall,

and paragraph 18 alleges that on February 22, 1999, Respondent suspended him.

There is no question that these events occurred as alleged. However, the parties do dispute whether the events violated the Act.

While he was on his own time and not scheduled to work, Mr. Hall passed out union literature outside the plant. This action took place on February 6, 1999, and the evidence clearly establishes that the Respondent was aware of it. See, for example, General Counsel's Exhibit 7, a note from Supervisor George Jackson, which stated that Mr. Hall was outside the plant, handing out union paper.

Thereafter, Mr. Hall received the February 12, 1999, warning, and the February 22, 1999, suspension, which also placed Mr. Hall on a 90-day plan to, in the words of the General Counsel, shape up or ship out.

These actions did not, on their face, concern Mr. Hall's handbilling for the union. Additionally, they did not directly concern a fact which may have irritated management, namely that Mr. Hall would not come in to work to substitute for an employee whose grandfather had died, but instead was out handbilling for the Union.

Instead, they concern Mr. Hall's work activities, including leaving his fork truck with a load in the air, being on the upper level of the plant when he had no reason to spend so much time there, and apparently a new practice of finding mistakes that other employees had made, printing out computer reports about them, and then providing these reports to supervision, which, according to very plausible testimony of various witnesses, caused consternation among the employees.

All of these, of course, are legitimate reasons for imposing discipline. Under a Wright Line analysis, the General Counsel clearly has established a prima facie case. The time of the disciplinary actions, just days after Mr. Hall handbilled for the union, is sufficient in my view to establish the necessary link, considering that there is other evidence of anti-union animus in the record.

But it is an extremely close question as to whether Respondent has established that it would have taken the same action against Mr. Hall, even if he had not been engaged in union activities. In fact, it would be difficult for me to over-emphasize how close this decision is, at least in my opinion.

But I do not view the evidence that is presently in the record as a substitute for the kind of documentation contemplated by the Board in its Lampi decision, the kind of documentation and the kind of testimony that would be needed for the Respondent to meet its burden of showing that, based upon how it had conducted itself in the past, it would have taken the same action, regardless of the alleged discriminatee's protected activities.

The record does contain some information about other employees, including some who almost came to blows in an altercation while off duty, and how Respondent treated them. But I do not view this evidence as a substitute for the documentation

that would establish a preponderance of the evidence to rebut the prima facie case.

So, in sum, I find that Respondent has failed to rebut the General Counsel's prima facie case, and I further find that Respondent violated the Act as alleged by the conduct alleged in paragraphs 17 and 18 of the Complaint.

When the transcript is completed in this case, I will receive a copy of the transcript and will issue a certification of bench decision. That certification will attach as an appendix a copy of the transcript of the decision as it was issued orally just now in the case.

When the parties receive the certification of bench decision, that event, the service on the parties, will trigger the time period for filing of exceptions or requesting the Board to review my decision. So to repeat again, the time period begins to run upon service of the certification.

The certification will include, in addition to the material that I have read into the record now, Notice, Remedy, and Order provisions to recommend effectuation of my findings here.

Finally, I must say I have appreciated the courtesy of the parties in this case and the stimulating legal arguments and zealous advocacy that they've demonstrated. Thank you very much.

The hearing is closed.

APPENDIX B

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT interrogate employees concerning their union and/or protected, concerted activities.

WE WILL NOT instruct employees to remove union stickers from their headgear.

WE WILL NOT threaten employees with the loss of a scheduled wage increase if the employees vote to be represented by a Union.

WE WILL NOT threaten employees with adverse action unless they stop engaging in union organizing activities.

WE WILL NOT advise employees that we are establishing a new committee, known as the Action Committee, which has as a purpose or function the soliciting of grievances from employ-

ees or the promising of benefits, and WE WILL NOT advise employees that the Action Committee is meeting on a given date for such purposes or functions.

WE WILL NOT take into account an employee's union and/or protected, concerted activities while conducting a job performance evaluation or preparing the employee's job performance appraisal.

WE WILL NOT, in any like or related manner, interfere with, restrain or coerce employees in the exercise of rights guaranteed by Section 7 of the National Labor Relations Act.

WE WILL rescind the appraisal given to employee William Hall on about December 21, 1998, expunge all references to it from our files, and prepare a new performance appraisal which

does not take into account William Hall's union and/or protected, concerted activities.

WE WILL rescind the disciplinary warning we issued to employee William Hall on February 12, 1999 and the suspension we issued to William Hall on February 22, 1999, and expunge all references to those actions from our files.

WE WILL make employee William Hall whole, with interest, for any losses he suffered because we unlawfully suspended him on February 22, 1999.

ALBIS PLASTICS